BRB No. 98-1011

LAVERNE JOHNSON FREEMAN Claimant v. NORFOLK SHIPBUILDING AND DRY DOCK CORPORATION and RICHARD-FLAGSHIP SERVICES, INCORPORATED Employer/Carrier-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: April 20, 1999 DECISION and ORDER

Appeal of the Decision and Order Denying Entitlement to Section 8(f) Relief of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert A. Rapaport and Dana Adler Rosen (Clarke, Dolph, Rapaport, Hardy & Hull, P.L.C., Norfolk, Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Denying Entitlement to Section 8(f) Relief (96-LHC-2160) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Worker's Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and in accordance with law. *O'Keeffe v. Smith, Hinchman, & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On January 18, 1993, while working as a grinder for employer, claimant sustained a work-related injury to her left shoulder. Claimant filed a claim for partial disability benefits under the Act. Employer paid temporary total disability benefits and temporary partial disability benefits. The parties agreed that claimant reached maximum medical improvement and that she was entitled to permanent partial disability benefits at a rate of $171.66 per week from November 13, 1995, and continuing.

The sole issue before the administrative law judge was employer's entitlement to relief under Section 8(f) of the Act. 33 U.S.C. §908(f). The administrative law judge found that employer failed to establish a pre-existing permanent partial disability as required by Section 8(f); therefore, he denied employer relief from the Special Fund. On appeal, employer challenges the administrative law judge's denial of relief under Section 8(f). The Director, Office of Workers' Compensation Programs (the Director), has not responded to this appeal.[1]

Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section

[1]We note that a prior appeal in this case, BRB No. 98-330, was dismissed as premature. *Freeman v. Norfolk Shipbuilding & Dry Dock Corp.*, BRB No. 98-330 (Feb. 17, 1998). Although the Director did not respond to the present appeal, the record contains a copy of a letter he filed in the first appeal, in which he urged affirmance of the administrative law judge's decision.

44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that her current permanent partial disability is not due solely to the subsequent work injury and "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines],* 138 F.3d 134, 32 BRBS 48 (CRT) (4th Cir. 1998); *Director, OWCP, v. Newport News Shipbuilding & Dry Dock Co. [Harcum II],* 131 F.3d 1079, 31 BRBS 164 (CRT) (4th Cir. 1997); *Hundley v. Newport News Shipbuilding & Dry Dock Co.,* 32 BRBS 254 (1998).

We vacate the administrative law judge's denial of Section 8(f) relief and remand this case for the administrative law judge to reconsider whether employer established a pre-existing, permanent partial disability under the proper legal standard. A pre-existing permanent partial disability for purposes of Section 8(f) need not be a disability which is compensable under the Act; substantial evidence of a serious, lasting physical condition which pre-exists the work injury will meet employer's burden. *See, e.g., Director, OWCP v. General Dynamics Corp. [Bergeron],* 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992). Although the mere existence of prior injuries is insufficient to establish the existence of a serious, lasting physical impairment, *Hundley,* 32 BRBS at 252, the fact that claimant did not lose any time from work due to a prior condition is not dispositive, as a condition need not be economically disabling in order to be a pre-existing permanent partial disability under Section 8(f). *Dugan v. Todd Shipyards, Inc.,* 22 BRBS 42 (1989).

In this case, the medical records from employer's clinic establish that claimant had numerous complaints over a period of years regarding carpal tunnel syndrome.[2] On December 17, 1990, claimant visited employer's medical clinic, and an EMG showed some right median nerve compression; Dr. Geib noted that claimant was to continue to wear wrist support. EX-9 at 3. One month later, employer's medical records note that claimant had been grinding for the past several weeks and had a recurrence of pain and tingling in her hands, especially her right one. It was also

[2]We note that although employer notes other prior injuries which claimant suffered, including a small injury to claimant's left leg on July 12, 1990, and another injury which occurred to claimant's right knee and left arm on March 25, 1991, employer does not adequately brief how these injuries would establish a pre-existing permanent partial disability. Accordingly, the administrative law judge's finding that these conditions did not establish a pre-existing permanent partial disability is affirmed.

noted that the pain in her right hand was waking her up at night. Dr. Geib diagnosed early carpal tunnel, prohibited claimant's use of power tools and suggested that claimant wear a brace. EX-9 at 4. The next month, employer's medical records note that claimant's right hand and wrist were better since she changed jobs, but she was to continue to wear the protective glove as needed, and the clinic recommended minimal use of power tools. She was discharged with no disability at this time. EX-9 at 6. About three months later, on May 28, 1991, claimant went to the clinic and stated that she was concerned that the carpal tunnel type problem might recur, and she was given a right carpal tunnel glove. EX-9 at 5. Then, on December 9, 1992, claimant stated that she had been gunning and grinding all day and that her left arm started hurting; she was diagnosed with tendinitis in left biceps. EX-9 at 8. On December 23, 1992, claimant complained that her left arm was no better, but now also complained of tingling in her right hand. EX-9 at 9.[3]

Although the administrative law judge accurately recited the above evidence, he did not analyze it as to whether claimant's documented hand, wrist and arm problems demonstrate the existence of a serious lasting physical condition. Specifically, he did not adequately explain his summary conclusions that the permanency of claimant's pre-1993 physical problems "was not apparent" and that the record does not establish a "chronic impairment or permanent partial disability," Decision and Order at 10, particularly in view of the record evidence discussed above documenting problems existing for several years. In addition, the administrative law judge did not give a sufficient explanation, based on the record, for his rejection of Dr. Archer's opinion that claimant's pre-1993 records demonstrate that she had a prior permanent partial disability. Decisions under the Act must comply with the Administrative Procedure Act, which requires that the administrative law judge adequately detail the rationale behind his decision, analyze and discuss the medical evidence of record, and explicitly set forth the reasons for his acceptance or rejection of such evidence in his decision. *See* 5 U.S.C. §557(c)(3)(A). In light of the administrative law judge's failure to fully analyze whether employer established a pre-existing permanent partial disability under Section 8(f), and his failure to comply with the requirements of the APA, we vacate his denial of Section 8(f) relief; on remand, the administrative law judge, taking into consideration the aforementioned medical reports, must reconsider the issue of whether claimant's prior carpal tunnel syndrome constituted a pre-existing

[3]Furthermore, in a letter dated October 10, 1995, Dr. Williamson noted that claimant stated that she had right wrist pain for four years. Dr. Williams diagnosed right ulnar nerve irritation in the right wrist unrelated to her accident and best treated conservatively. EX-9 at 9.

permanent partial disability. If the administrative law judge finds that this element of entitlement to Section (f) relief was met, he must then consider whether this injury was manifest to employer and whether claimant's current permanent partial disability is not due solely to the subsequent work injury. *See Harcum II,* 131 F.3d at 1079, 31 BRBS at 164 (CRT).

Accordingly, the administrative law judge's determination that employer is not entitled to Section 8(f) relief is vacated, and the case is remanded for further findings in accordance with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge